U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 14 January 2003

Case No: 1997-BLA-0862

In the Matter of

ROBERT PRICE,
Claimant

v.

COAL POWER CORPORATION,
Employer,

AMERICAN RESOURCES INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

James D. Holliday, Esquire
For the claimant

H. Bert Stonecipher, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents

of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On November 30, 2001, this case was remanded to the Office of Administrative Law Judges for reconsideration from the Benefits Review Board. The parties had full opportunity to present briefs by September 30, 2002, addressing the issues presented for reconsideration.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues have been remanded for resolution:

1. whether the miner has pneumoconiosis as defined by the Act and regulations pursuant to 20 C.F.R. § 718.202(a)(4); and

2. whether the evidence establishes that the named responsible operator lacks the ability to potentially pay benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Robert J. Price, was born on June 22, 1944. Mr. Price married Dura Anne Phillips on December 22, 1989, and they reside together.

Mr. Price filed his instant application for black lung benefits on November 23, 1992. The Office of Workers' Compensation Programs denied the claim on May 20, 1993. Pursuant to Claimant's appeal on January 3, 1995, the case was transferred to the Office of Administrative Law Judges on February 23, 1996. After a remand to the District Director to address the responsible operator issue, the case came under the jurisdiction of the Office of Administrative Law

Judges again on March 13, 1997. On June 1, 1998, an administrative law judge issued a Decision and Order denying Claimant benefits. The administrative law judge ruled that Claimant was totally disabled but did not suffer from pneumoconiosis.

Claimant appealed and the employer cross-appealed. The Board remanded the case to the administrative law judge, vacating his determinations concerning the responsible operator status and pneumoconiosis under section 718.202(a)(4). The Board affirmed the remaining determinations of the administrative law judge, including his findings addressing total disability and length of coal mine employment.

Upon remand, the administrative law judge again denied benefits. The administrative law judge determined that the evidence remained insufficient to demonstrate pneumoconiosis under section 718.202(a)(4). The administrative law judge reversed, however, his earlier ruling addressing the responsible operator. The administrative law judge dismissed Respondent, Coal Power Corporation, from the case.

Claimant appealed for the second time, and he was joined by the Director's cross-appeal. Claimant argued that the administrative law judge erred in weighing the medical opinions when he found that Claimant failed to establish the existence of pneumoconiosis. In its cross-appeal, the Director advanced that the judge erred by ignoring evidence while making his responsible operator determination. Upon appeal, the Board agreed with both Claimant and the Director. The Board subsequently vacated the administrative law judge's decision and remanded the case for a further review of the evidence concerning the existence of pneumoconiosis under section 718.202(a)(4) and the financial state of the responsible operator.

Narrative Medical Evidence

Dr. Robert W. Powell, board-certified in internal medicine and pulmonary medicine, examined Claimant on May 13, 1994. (DX 59). Claimant presented him with an approximately twenty-three year coal mine employment history comprised of four years of underground employment and nineteen years of above ground employment as a drill runner and equipment operator. Claimant complained of shortness of breath, wheezing, and daily cough. The doctor also recorded that Claimant possessed a substantial smoking history – twenty-three years of smoking two or three packs per day followed by five or six years of smoking one or one and one-half packs per day. In addition to his physical examination, the doctor administered a chest x-ray, electrocardiogram, oxygen saturation test, and a pulmonary function test. Dr. Powell recorded that the electrocardiogram results were normal, the x-ray film presented no evidence of pneumoconiosis, the oxygen saturation rate was 93%, and the pulmonary function test revealed an 85% total lung capacity and a residual volume of 136%. The doctor diagnosed 1) no coal worker's pneumoconiosis; 2) severe obstructive ventilatory defect with hyperinflation diagnostic of pulmonary emphysema due to tobacco smoking; and 3) old granulomatous disease. He concluded that the claimant should stop smoking and referred Claimant to his primary physician to attend to his obstructive airways disease.

Dr. Powell was deposed on February 9, 1996. (DX 59). His testimony restated his written findings and his diagnoses. Upon further questioning about Claimant's sputum production, Dr. Powell admitted that the history he recorded for Claimant's symptoms may not have been detailed enough. (Powell Depo., p. 19). Dr. Powell also added that Claimant likely suffered from bronchitis and chronic obstructive pulmonary disease. (Powell Depo., p. 20, 22-23). The doctor further opined, however, that Claimant's chronic obstructive pulmonary disease was not due to coal dust. (Powell Depo., p. 24-25). Dr. Powell was asked how he determined that Claimant's chronic obstructive pulmonary disease was caused by smoking and not at all caused by coal dust inhalation. The doctor responded:

> [A]: And that explanation has been accumulated by me over the years from reading the literature and from my association with my teachers and colleagues who deal in these areas, and my own personal experience.
> ....
> ...[O]ver the years of my practice I have seen many 49 year old men who smoked as Mr. Price has, and have the changes that he has without any additional exposure being required. *Now there is no way for me to know if some of the things to which he was exposed during his life, both at work and away from home, may not have contributed some to the changes that he has suffered.*
>
> [Q]: You wouldn't rule out coal dust as an etiological factor in his [chronic obstructive pulmonary disease]?
>
> [A]: With the exception – I would, and the reason that I would is because men who do not smoke, who have as much or much more exposure to coal dust than he has had, do not develop the changes that he has. So it required more than just the exposures that he has had and that more is cigarette smoking.
> ....
> Men who don't smoke simply do not get the changes that he has even with similar exposures to what he had. There isn't even a small group of particularly susceptible individuals who get these changes without some other reason, even though they have the same exposure he has.

(Powell Depo. 26-27)(emphasis added). Dr. Powell was further pressed for clarification.

> [Q]: Tell me how you determine how much of the deficit is caused by cigarette smoking and how much is caused by coal dust exposure other than by the epidemiological studies?

> [A]: You can't.
> ....
> And he has probably no abnormality from the time that he spent in coal mining early in his career. Now I cannot say with absolute certainty that some very small percentage of the reduction of his FEV1 is not due to his exposure, I can't say with certainty.
> ....
> I do not believe that it is significant, I do not believe that he would have reductions below what is considered normal if he had not had the other exposures, specifically to tobacco. However, I cannot be absolutely certain that a small portion of the reduction is not due to his work exposure.

(Powell Depo., p. 29-30). Dr. Powell concluded his testimony by testifying that he does not believe that coal dust exposure causes chronic obstructive pulmonary disease, but that it causes industrial bronchitis. (Powell Depo., p. 32). The doctor stated that if coal dust exposure contributed to obstructive airways disease, its contribution was "minimal." *Id.*

Dr. Thomas M. Jarboe, board-certified in internal medicine and pulmonary medicine, examined Claimant on September 2, 1993. (DX 53). At the time of the examination, Claimant was still working in the coal mining industry, and Claimant presented to the doctor an employment history consisting of five years underground at the mine face and nearly twenty years above ground as a coal loader, dozer operator, and truck driver. Dr. Jarboe also recorded that Claimant had a twenty-seven year smoking history, ranging from two packs per day to one pack per day. The doctor stated that the history was "greater than [a] 30 pack year history of smoking." During the examination, Claimant complained of a shortness of breath, dyspnea upon exertion such as climbing 30 steps, cough, sputum production, and wheezing. In addition to his physical examination, Dr. Jarboe submitted Claimant to a chest x-ray, pulmonary function test, and an arterial blood gas study. The doctor noted that the x-ray presented no signs of pneumoconiosis, the pulmonary function test results evinced a moderate degree of airway obstruction, and the arterial blood gas study results revealed a significantly elevated carboxy hemoglobin with exposure to tobacco smoke. Dr. Jarboe diagnosed chronic bronchitis based upon Claimant's history of cough and "probably" pulmonary emphysema based on the chest x-ray film and the doctor's physical examination observations. The doctor attributed both diagnoses to cigarette smoking. He did not address the impact of Claimant's coal dust exposure on his diagnoses, if any.

Dr. Jarboe was deposed on September 26, 1995. (DX 54). The doctor reviewed and reiterated the findings of his narrative report. Beyond his findings, the doctor was asked to expound upon several of his conclusions. In doing so, Dr. Jarboe opined that simple, Category I pneumoconiosis does not cause pulmonary impairment. (Jarboe Depo., p. 19). In addition, Dr. Jarboe was asked how he apportioned Claimant's pulmonary impairment between his tobacco smoking and coal dust inhalation. The doctor explained that he attributed all of Claimant's pulmonary impairment to his smoking history because 1) cigarette smoking was much more likely to cause the type

of damage present in the claimant and 2) he did not believe that coal dust inhalation caused radiographically-obvious emphysema such as suffered from Claimant. However, Dr. Jarboe later testified that he did apportion some of Claimant's pulmonary impairment to coal dust inhalation, albeit a "small portion." (Jarboe Depo., p. 38).

Dr. John E. Myers, Jr., board-certified in internal medicine, examined Claimant on October 5, 1992. (DX 36). Claimant presented the doctor with an approximately twenty-two year coal mine employment history. Dr. Myers noted that the majority of his coal mine employment was supervisory in nature and that six years were spent working underground. During the examination, Claimant complained of shortness of breath, dyspnea upon exertion such as walking one block or climbing one or two flights of stairs, cough, sputum production, and wheezing. The doctor specifically recorded that Claimant smoked two to three packs of cigarettes per day for thirty years and had recently cut down to one-half pack per day. In addition to his physical examination, Dr. Myers administered a chest x-ray, pulmonary function test, and an electrocardiogram. Dr. Myers stated that the x-ray film presented evidence of pneumoconiosis, the pulmonary function test evinced moderate obstructive and mild restrictive defects, and the electrocardiogram results were within normal limits. After his testing, the doctor diagnosed 1) coal workers' pneumoconiosis, 2) chronic obstructive pulmonary disease, and 3) residuals of pneumonia in childhood. Dr. Myers stated no bases for his diagnoses except for noting the x-ray results after his pneumoconiosis diagnosis. Dr. Myers concluded that Claimant suffered from a respiratory impairment but did retain the ability, from a pulmonary standpoint, to perform his usual coal mine employment.

Dr. Myers was deposed on September 18, 1995. (DX 53). Dr. Myers's testimony reiterated his findings after his physical examination of the claimant in 1992. The doctor explained that there existed no way to determine how much of Claimant's bronchitis was attributable to cigarette smoking versus coal dust inhalation. (Myers Depo., p. 8).

Dr. S. S. Kraman issued an opinion letter on November 6, 1994. (DX 44). Dr. Kraman apparently reviewed various materials in the case, and he stated, "There is no evidence to support a diagnosis of pneumoconiosis in this patient. His vent studies are valid and are consistent with chronic obstructive lung disease caused by his very heavy smoking habit." *Id.* Dr. Kraman provided no rationale for his opinions. Furthermore, he did not document the evidence he reviewed in formulating his opinion.

Dr. Bruce C. Broudy, board-certified in internal medicine and pulmonary medicine, examined Claimant on March 10, 1994. (DX 40). Dr. Broudy had previously examined Claimant on July 1, 1993. Dr. Broudy took Claimant's social and medical histories, specifically noting a twenty-five year, approximately two packs per day smoking history. The claimant presented the doctor with a twenty-two year coal mine employment history, five years of which were spent in underground coal mining performing supervisory work. Dr. Broudy noted that Claimant's above-ground coal mining work consisted of operating a drill, dozer, loader, and grader. During the

examination, Claimant relayed various symptoms to the doctor, including dyspnea upon exertion such as climbing 30 stair steps, smothering, chronic cough, sputum production, and wheezing. Beyond his physical examination, Dr. Broudy administered a pulmonary function test, an arterial blood gas study, and a chest x-ray. In his report, the doctor diagnosed chronic obstructive airways disease due to chronic asthmatic bronchitis. Dr. Broudy attributed the chronic asthmatic bronchitis to 1) cigarette smoking and 2) some predisposition to asthma or bronchospasm. The doctor stated that Claimant was unable to perform his usual coal mine employment. Dr. Broudy further opined that Claimant neither suffered from pneumoconiosis nor possessed any significant pulmonary disease or respiratory impairment which has arisen from his coal mining work.

Dr. Glen Baker, board-certified in internal medicine and pulmonary medicine, examined Claimant on October 2, 1992. (DX 36). Dr. Baker noted in his report that Claimant worked twenty-four years in the coal mining industry, including six years of underground work as an auger operator and eighteen years of surface miner as a dozer and drill operator. The doctor also noted that Claimant possessed a thirty year, one pack per day smoking history. Claimant's chief complaints were difficulty breathing, wheezing, sputum production, cough, and dyspnea upon exertion such as walking between one-quarter and one-half mile. In addition to his physical examination, Dr. Baker submitted Claimant to a chest x-ray and a pulmonary function test. He noted that the x-ray film demonstrated pneumoconiosis and the pulmonary function test evinced a mild obstructive ventilatory defect. Dr. Baker diagnosed coal workers' pneumoconiosis based upon Claimant's chest x-ray and history of dust exposure, chronic obstructive airway disease with mild obstructive defect based upon pulmonary function testing, and bronchitis based on history. The doctor opined that the claimant's conditions rendered him unable from a respiratory standpoint to perform his usual coal mine employment or comparable employment in a dust-free environment.

Dr. Baker subsequently examined Claimant on February 9, 1993. (DX 12). The doctor took Claimant's medical and social histories, noting that Claimant had smoked one pack of cigarettes per day since 1972. During the second examination, Claimant's chief complaints were sputum production, wheezing, dyspnea upon exertion such as walking one-quarter to one-half mile on level ground, and cough. The doctor submitted him to a chest x-ray, pulmonary function study, and an arterial blood gas study. Dr. Baker opined that the x-ray film revealed pneumoconiosis, the pulmonary function test results evidenced a mild obstructive defect, and the arterial blood gas study demonstrated a mild resting arterial hypoxemia. Dr. Baker diagnosed 1) coal workers' pneumoconiosis based upon Claimant's x-ray and coal dust exposure history, 2) chronic obstructive pulmonary disease based upon Claimant's pulmonary function test results, 3) hypoxemia based upon Claimant's arterial blood gas study results, and 4) bronchitis based upon Claimant's history of cough, sputum production, and wheezing. Dr. Baker attributed Claimant's pneumoconiosis to his coal dust exposure and the latter three diagnoses to coal dust exposure and cigarette smoking. The doctor concluded that Claimant's pulmonary impairment was "mild."

DISCUSSION AND APPLICABLE LAW

Because Mr. Price filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis; however, only the final method for demonstrating the presence of pneumoconiosis is at issue in the instant case.

Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields*, *supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

The record contains narrative reports and supplemental depositions from six physicians. I will discuss each opinion, and the weight I accord it, individually.

Dr. Powell's written report diagnosed old granulomatous disease and a severe obstruc-tive ventilatory defect with hyperinflation diagnostic of pulmonary emphysema due to tobacco smoking. During his deposition, however, the doctor also opined that Claimant suffered from bronchitis and chronic obstructive pulmonary disease. Considering the doctor's written report and deposition as a whole, I find his opinion concerning the presence of legal or clinical pneumoconiosis well reasoned and well documented, and I grant it probative weight. While the written report provides no discussion of the bases of his diagnoses, the doctor's deposition sufficiently details the bases for his conclusions. In addition, the doctor's conclusions follow reasonably from the objective testing data and his examination observations. Thus, the doctor's diagnosis of legal pneumoconiosis in the form of chronic obstructive pulmonary disease, is evidence favoring Claimant's application for benefits.

Dr. Jarboe diagnosed chronic bronchitis and "probable" pulmonary emphysema. In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment. Considering the doctor's written report and deposition as a whole, I find his opinion well reasoned and well documented. Dr. Jarboe recorded a detailed patient history, upon which he reasonably based his diagnoses after his clinical observations and objective testing verified Claimant's symptoms. Accordingly, I grant his opinion regarding the presence of legal pneumoconiosis probative weight. I do, however, grant the doctor's diagnosis of "probable" pulmonary emphysema less weight due to its equivocal nature. An opinion may be given little weight if it is equivocal or vague. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000).

Dr. Myers diagnosed clinical and legal pneumoconiosis when he opined that Claimant suffered from coal workers' pneumoconiosis and chronic obstructive pulmonary disease. The doctor's report is well documented and it provides clear diagnoses. Thus, I find his opinion entitled to, at least, moderate probative weight. Dr. Myers fails, however, to provide an explicit discussion of the bases for his diagnoses in his written report. Likewise, the doctor's deposition fails to provide a clear rationale for the doctor's diagnoses. Thus, I accord the doctor's opinion less weight.

I grant little weight to Dr. Kraman's opinion as it is poorly reasoned and poorly documented. Dr. Kraman provides no objective medical data to bolster his analysis, despite referring to a prior pulmonary function test and his review of other medical evidence. Furthermore, the doctor provides no bases for his ultimate medical conclusions. Accordingly, I grant his opinion little weight.

Dr. Broudy diagnosed legal pneumoconiosis when he opined that Claimant suffered from chronic obstructive airways disease and asthmatic bronchitis. *See Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983); *Hughes*, 21 B.L.R. at 1-139. I find the doctor's opinion well reasoned and well documented, and I grant it probative weight.

Dr. Baker opined that Claimant suffered from clinical and legal pneumoconiosis when he diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and bronchitis. I grant no weight to the doctor's diagnosis of coal workers' pneumoconiosis, however, as it was based solely on Claimant's chest x-ray and history of dust exposure. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. The Benefits Review Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Benefits Review Board

explained that the fact that a miner worked for a certain period of time in the coal mines alone "does not tend to establish that he does not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.*

Conversely, I grant the doctor's diagnosis of chronic obstructive pulmonary disease and bronchitis probative weight. Dr. Baker's opinion is well reasoned and well documented. He reaches clear conclusions that follow reasonably from his reported observations and the objective pulmonary testing.

Considering all of the narrative opinions, I easily concluded that the preponderance of the evidence weighs in favor of finding that Claimant suffers from pneumoconiosis. Each opinion diagnoses legal pneumoconiosis and several opinions include a diagnosis of coal workers' pneumoconiosis. Despite receiving varying amounts of probative weight, the narrative evidence is uniform in its conclusion that Claimant suffers from legal pneumoconiosis.

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a).

Because Mr. Price has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis.

In the narrative opinions of record, several physicians opined that Claimant's pneumoconiosis was caused by his heavy history of cigarette smoking and not his coal dust inhalation. The substantial evidence of Claimant's lengthy and extensive smoking history rebuts any presumption to which he is entitled. Accordingly, I must weigh the evidence addressing the etiology of Claimant's pneumoconiosis to determine his entitlement to benefits.

First, I place greater weight on the opinions of Drs. Baker, Jarboe, Powell, and Broudy as each is board-certified in internal medicine and pulmonary medicine. Their superior credentials render their opinions more probative. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

Dr. Powell opined that Claimant's coal dust inhalation was not a significant factor in his chronic obstructive pulmonary disease, but he admitted that coal dust inhalation may have caused a "small portion of the reduction." (Powell Depo., p. 29-30). I find Dr. Powell's analysis well reasoned and well documented. The doctor adequately addresses both Claimant's history of coal

dust inhalation and cigarette smoking in his analysis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000). However, Dr. Powell testified that he does not believe that coal dust exposure causes chronic obstructive pulmonary disease. (Powell Depo., p. 32). The doctor's assertion is contrary to the regulatory provisions of the Act and renders his opinion less probative.

Dr. Jarboe attributed his diagnoses of chronic bronchitis and pulmonary emphysema to Claimant's cigarette smoking. In his written report, Dr. Jarboe did not address the impact of Claimant's coal dust exposure on the diagnosed conditions. In his deposition testimony, however, the doctor testified that he did believe a "small portion" of the impairment resulted from coal dust inhalation. I find such equivocation slightly reduces the probative value of the doctor's opinion. Overall, however, I found the doctor's opinion – as encompassed in his written report and deposition testimony – was well reasoned and well documented. He adequately addresses both Claimant's history of coal dust inhalation and cigarette smoking in his analysis. *Cornett*, 227 F.3d at 576-77.

Dr. Myers attributed Claimant's chronic obstructive pulmonary disease to cigarette smoking and coal dust inhalation. He testified that there existed no way to apportion the effect between the two causes. I find his opinion well reasoned and well documented. Dr. Myers has sufficiently detailed his analysis, and it is supported by the objective medical data he cites.

I grant Dr. Kraman's opinion concerning the etiology of Claimant's chronic obstructive pulmonary disease little weight. The doctor's does not discuss the effect of Claimant's coal dust inhalation history and he fails to explain how the results of Claimant's pulmonary function study are consistent with a "very heavy smoking habit."

Dr. Broudy's opinion addressing the etiology of Claimant's chronic bronchitis is poorly reasoned. The doctor fails to discuss the impact of Claimant's coal dust inhalation history on Claimant's chronic bronchitis. Instead, the doctor merely attributed the chronic bronchitis to cigarette smoking. I find such an omission renders his opinion entitled to less probative weight. *See Cornett*, 227 F.3d at 576-77.

Dr. Baker attributed Claimant's chronic obstructive pulmonary disease, hypoxemia, and bronchitis to coal dust exposure and cigarette smoking. In his two examination reports, Dr. Baker reports two different smoking histories. In his October 1992 report, Dr. Baker records that Claimant possessed a thirty year, one pack per day smoking history, whereas in February 1993 Dr. Baker noted that Claimant possessed a twenty-one year, one pack per day smoking history. The doctor's reporting of conflicting smoking histories renders his opinion that smoking caused, in part, Claimant's chronic obstructive pulmonary disease, hypoxemia, and bronchitis somewhat less probative, perhaps. But, given the significant coal dust exposure history relied upon in all narrative reports of record, the conflict does not remove significant probative value from the doctor's opinion on causation. Accordingly, I grant Dr. Baker's opinion moderate probative weight.

When I consider all of the evidence of causation, I find the preponderance of the evidence does not establish that Claimant's pneumoconiosis arose from coal mine employment. Only Drs. Myers and Baker opined that Claimant's pneumoconiosis arose in part because of his coal dust inhalation, whereas Drs. Powell, Jarboe, Broudy, and Kraman opined that Claimant' pulmonary condition was caused by his cigarette smoking. Drs. Powell and Jarboe testified that the impact of Claimant's coal dust inhalation was negligible or "small." Even if I discard the opinion of Dr. Kraman, to which I accorded little probative value, I find the probative value of the opinions of Drs. Powell, Jarboe, and Broudy outweighs the probative value of the opinions Drs. Baker and Myers.

Furthermore, the evidence of record simply comports more accurately with the conclusions of Drs. Powell, Jarboe, and Broudy. Claimant possessed a substantial, sustained smoking history, whereas his dust exposure was limited, despite his twenty-two years in the coal mining industry. The evidence reveals that the majority of Claimant's work was on the surface and, indeed, some of his work took place away from the mine site altogether. For these reasons, I find that Claimant has failed to establish, by a preponderance of the evidence, that his pneumoconiosis arose in part from coal mine employment.

In sum, the evidence does not establish that Mr. Price suffers from pneumoconiosis arising out of coal mine employment. Accordingly, Claimant is not entitled to benefits.

Responsible Operator

The regulations provide that the employer with which Claimant had the most recent period of cumulative employment of not less that one year shall be the responsible operator. 20 C.F.R. § 725.493(a)(1) (2000).[1] The regulations further require that the operator be capable of assuming its liability for the payment of continuing benefits through purchasing insurance, self-insuring, or possessing assets available for the payment of benefits. §725.492(a)(4)(iii). In the absence of contrary evidence, "a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part." §725.492(b).

Claimant's coal mine employment history is complex and unclear. To facilitate my analysis, I have attempted to discuss, in detail, the evidence of record addressing his coal mine employment.

On his employment history form, Mr. Price indicated that he worked for Coal Power Corporation from 1974 to 1987. The last employment listed was for Bright Star Mining as

[1] The regulations addressing the designation of the proper responsible operator have been revised; however, the revised regulations only apply to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

superintendent at a strip mine from 1987 to December 1989. (DX 2). However, his Kentucky workers' compensation claim was filed in 1993 or 1994 against College View Contracting for coal workers' pneumoconiosis. (DX 3).

The Social Security statement of earnings shows that Mr. Price worked for Coal Power Corporation from 1974 through 1988, for PC&H Construction from 1985 through 1988, for Britestar Mining Inc. from 1988 to 1989, for College View Contracting Inc. for 1991, and that he was self employed in 1989, 1990, and 1991. (DX 4). For those years in which he worked for more than one employer, he earned $45,000 from Coal Power Corp. in 1988, $15,900 from PC&H Construction in 1988, and $33,000 from Britestar Mining in 1988. He earned $31,500 from Britestar in 1989 and $16,500 while he was self employed in 1989. He earned $7,750 from College View Contracting Inc. in 1991, and $24,600 while he was self employed in 1991. Internal Revenue Forms W-2 confirm that in 1988, Mr. Price earned $15,900 from PC&H Construction; $46,500 from Coal Power; and either $31,500 or $33,000 from Britestar. There is also a 1991 W-2 form from College View, showing that the miner earned $7,750.

A letter dated May 19, 1993 from Britestar Mining's bookkeeper states that Mr. Price was on its payroll from July 30, 1988 to May 26, 1989, during which time he earned $64,500. (DX 5). He then worked for the company on a contract basis from May 29, 1989 to December 2, 1989, earning $22,500. Mr. Price was Britestar's registered agent until March 16, 1989, and its articles of incorporation show that Britestar was in the business of purchasing, leasing, acquiring, owning, mining, operating, developing, selling and conveying coal, among other things. (DX 5). Britestar was insured by the Kentucky Coal Producers' Self-Insurance Fund, pursuant to the Federal Coal Mine Health and Safety Act, effective August 16, 1988. Its coverage, however, was canceled effective July 8, 1989. In a letter dated April 12, 1993, Mr. Price stated that Britestar Mining was no longer in business, all operations having stopped in July 1989. (DX 28). In his 1993 deposition, Claimant testified that Britestar had ceased operation around December 1989. (EX 1, p. 19). Claimant explained that the mine operated on leased land and the equipment had been sold to settle his father's estate. (EX 1, p. 20-21).

In completing questions posed by the Department of Labor, Mr. Price indicated that he performed managerial work for PC&H Construction, which was coal mine work. He also stated that as part of his self employment, he owned and operated equipment at Coal Power Corp. from 1974 to 1989, and was a manager and equipment operator for Britestar Mining Inc. from 1989 to 1990. (DX 8). In describing his work as a foreman from 1987 to December 1989, Mr. Price stated that he supervised employees and occasionally ran equipment, which required him to occasionally lift and carry over one hundred pounds. (DX 9). He operated rock trucks, vertical drills, end loaders, dozers, sweepers, road graders, and coal trucks.

When Mr. Price was examined by Dr. Baker in 1993, he stated that his most recent coal mine employment was with Britestar Mining. Dr. Myers received an employment history that Mr. Price worked as a construction foreman in 1992, preparing sites for HUD multi-unit development

and that work involved blasting, drilling, ground leveling, and ground preparation, and that his most recent coal mine employment was in a supervisory capacity with Britestar Mining, ending in either 1989 or 1990. (DX 36). In 1994, Mr. Price gave Dr. Broudy the same information, noting that his work with Britestar ended in 1990. (DX 40). However, in September 1993, he informed Dr. Jarboe that he was working on a strip mine running a bulldozer, loader, and rock truck. (DX 51).

At the August 29, 1996 hearing, Mr. Price testified that he owned and operated Coal Power Corp. from 1974 until it went out of business in either late 1989 or early 1990. (DX 59). He then worked for Britestar Mining as a superintendent for two years. He oversaw the day-to-day operations and ran equipment almost every day. He was exposed daily to coal and rock dust during this employment. He worked for Britestar until either December 1990 or January 1991, was unemployed for a year, and then worked for College View Construction, which was not coal mine employment. He later worked about eight or nine months for Carbon River Coal and that was his last coal mining job. Regarding his work for PC&H, Mr. Price testified that he worked in a managerial capacity in the office at the foot of the hill but would spend six to seven hours of a ten hour day in the strip mining area.

Mr. Price was deposed on November 12, 1996. (DX 59). He testified that his company, Coal Power Corporation, was in the business of extracting or processing coal from 1974 to either 1988 or 1989. He also owned and was president of PC&H Construction from 1984 or 1985 to 1989. He stated that the company was involved in coal mining at a surface mine in the Fleming Neon area. He ran the company but was at the mine site only two or three times a week. He was exposed to coal dust at those times. He gradually (over a period of about two months) went to the site less and less, until either late 1988 or early 1989, when he no longer worked at PC&H. At that time, he started another mine in Pike County. He explained that they moved from Perry County to Pike County, and Coal Power started the job. It ran for about a month or two, and then he sold the equipment and all assets to Britestar. His father, however, and not he, was the owner of Britestar. The mine was located at a different site and most of the employees were different. Mr. Price also testified that College View Contracting was not a coal mine and had nothing to do with coal mining. He earned about $750 a week and worked there a little over a year. He added that the last company for which he worked one full year was Coal Power. Although he almost worked for Britestar for a year, he testified that it was not quite a year.

In summary, I find that Mr. Price worked for Coal Power Corporation from 1974 to late 1988 or early 1989. His last full year of employment with this company was 1988, when he earned $46,500. From 1985 to 1988, Mr. Price also worked for PC& H Construction, where he was the manager of this coal mine employer. Although his hearing and deposition testimony differs, I find his deposition testimony more credible. Therefore, I find that he worked in the office for PC&H and was at the actual work site, where he would be exposed to coal dust only two or three times a week, until, by the end of 1988, he no longer went to the work site. He earned $15,900 while working for PC&H in 1988.

Britestar began in July 1988, and Mr. Price worked there until May 26, 1989, according to the company's bookkeeper. (DX 5). However, Mr. Price testified that he continued to work on a contract basis with Britestar until December 2, 1989. He earned a total of $64,500 with Britestar in 1988, and $22,500 in 1989. Adding both his employment and contract-basis work with Britestar, Mr. Price worked for the company for more than a year, which is consistent with his hearing testimony.

Finally, Mr. Price's work for College View in 1991 earned him $7,750. He filed a workers' compensation claim in Kentucky against this employer, claiming the occupational disease of coal workers' pneumoconiosis. I note, however, that the claim was settled. Thus, I do not consider Mr. Price's state claim against College View binding, or even persuasive, on this issue.

Among the three most recent coal mine employers–Coal Power, Britestar, and PC&H, I find that Mr. Price's most recent coal mine employment of at least one year was with Britestar. He clearly was employed by Britestar from July 30, 1988 to May 26, 1989, for a total of ten months. His later work for Britestar, from May 29, 1989 to December 2, 1989–for an additional six months–on a contract basis, also qualifies as coal mine employment. I find, based on the hearing testimony, that Mr. Price continued his work as a superintendent and equipment operator. It is thus necessary to determine if his status was as an independent contractor, a self-employed operator, or an employee.

An independent contractor may be deemed an operator liable for the payment of benefits if that contractor performed services at a mine. 20 C.F.R. § 725.491(c)(1). An independent contractor is, for example, typically a company which provides heavy equipment services and maintains a continued presence at the mine. *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1986). Mr. Price's relationship with Britestar was not of this nature.

Primary consideration must be given to whether Britestar was directly responsible for the supervision, operation, and control of the mine where Mr. Price worked. Four factors bearing on this inquiry are: (1) the right to exercise control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. *Crabtree v. Bethlehem Steel Corp*., 7 BLR 1-354 (1984).

In this case in which Mr. Price's father owned the company, and Mr. Price's company first worked the site, the lines of control are somewhat blurred. The right to exercise control over Mr. Price's activities cannot be clearly determined because he was a supervisor and the owner's son. He was clearly paid by Britestar, however, as evidenced by the Social Security statements and the W-2 forms. The equipment Mr. Price operated was provided by Britestar; Mr. Price did not privately own the equipment. It is also not clear whether Britestar was able to fire the claimant. Based on this evaluation, and even though Mr. Price described himself as an independent contractor, I do not find that he was. I find that Britestar was Mr. Price's employer from July 30, 1988 to December 2, 1989. My finding is further supported by Section 725.491(c)(2)(ii), which

states that a self-employed operator "may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator." Britestar is thus the most recent employer for which Claimant worked over one year of cumulative employment.

As noted above, the regulations require that the responsible operator be capable of assuming its liability for the payment of continuing benefits. §725.492(a)(4)(iii). In the absence of contrary evidence, "a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part." §725.492(b). I find the instant record is devoid of probative evidence demonstrating an inability to pay on the part of Britestar. The Benefits Review Board has directed this Court's attention to Claimant's August 3, 1993 deposition as possible evidence, if credited, of Britestar's inability to pay benefits. I have carefully reviewed Claimant's deposition testimony, and I do not credit it. His testimony is simply too vague to receive probative weight on this issue. Claimant provides no concrete evidence of Britestar's inability to pay. Rather, he offers generalized guesses. He admits that he did not work in the financial end of the company, (EX 1, p. 30), and, furthermore, he testified that settlement of the assets of the company was not complete at the time of his testimony. (EX 1, p. 18). He did not know the full extent of the company's assets, nor did he know the whereabouts of the payroll or financial records. (EX 1, p. 16, 22). Such testimony does not present credible evidence of an inability to pay on the part of Britestar.

Likewise, Mr. Price's April 12, 1993 letter, in which he stated that Britestar Mining was no longer in business, is not helpful. (DX 28). The letter was produced before his deposition testimony and similarly provides no details on the assets of the company. Indeed, I find the presence of Ms. Imogene Sullivan's May 19, 1993 letter contradicts Claimant's testimony that Britestar ceased all existence after his father's death in 1990. (DX 5). Ms. Sullivan's letter is written on Britestar Mining Company letterhead, and it makes no mention that the company had ceased to exist.

Accordingly, I find the record contains no probative evidence demonstrating the inability of Britestar to pay for benefits, if awarded in the future.

Conclusion

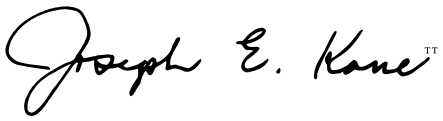
In sum, the evidence does not establish the existence of pneumoconiosis arising out of coal mine employment. Furthermore, I find Britestar Mining Company is the responsible operator. Coal Power Corporation and its carrier should be dismissed as parties. Accordingly, the claim of Robert Price must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Robert Price for benefits under the Act is denied.



JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.